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No. 86-634

In The Supreme Court of The United States

OCTOBER TERM, 1986

SANGUINE, LTD.,
Petitioner,

vs.

UNITED STATES DEPARTMENT OF THE INTERIOR, et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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Petitioner, Sanguine, Ltd., submits this brief in reply to arguments raised in the briefs of the respondents.

ARGUMENT

THE DECISION BELOW IS CONTRARY TO THE PLAIN HOLDINGS OF THIS COURT.

The argument raised by all intervenor respondents in opposition to this Court's granting of the Petition for Writ of Certiorari is that this Court's prior holdings are distinguishable from the instant case because in the prior cases relied upon by Sanguine, Ltd., the government's representation of the Indian intervenors was adequate. *But see Nevada v. United States,* 463 U.S. 110 (1983); *Arizona v. California,* 460 U.S. 605 (1983). *See also Heckman v. United States,* 224 U.S. 413 (1912). The court of appeals reached the same conclusion. *Sanguine, Ltd. v. United States Department of Interior,* 798 F.2d 389, 391 (10th Cir. 1986). The erroneous effort of the respondents and of the court of appeals to distinguish this case from this Court's prior rulings is precisely the reason why certiorari should be granted.

In *Nevada v. United States, supra,* the Court expressly declined to "pass judgment on the quality of representation that the Tribe received," noting, however, that the government had paid $8,000,000.00 in settlement of the Tribe's claim of inadequate representation. 463 U.S. at 135 n.14. Moreover, the Court held, "If in carrying out their role as representative, the Government *violated its obligations to the Tribe,* then the Tribe's remedy is against the Government, not against third parties." *Id.* at 144 n.16 (italics supplied). It is thus not possible to distinguish this case from *Nevada v. United States* upon the grounds that the restricted Indians assert that the representation of the United States

was not adequate.[1]

In *Arizona v. California, supra,* the Court's decision not to permit a relitigation of prior interlocutory decrees also revolved not around the *adequacy* of the government's representation,[2] but the *fact* of government representation. The Court relied upon its long-standing decision in *Heckman v. United States, supra,* in support of its holding that the government had full authority to bind the Indians in litigation. The holding of *Heckman* was not that the Indians would be bound by "adequate" government representation, but that the Indians would be absolutely bound by government representation.[3]

Thus, the present case is not "unique" and is not distinguishable from this Court's prior decisions, as respondents have claimed (Intervenor Resp. Br. at 5). To the contrary, the court of appeals has simply rejected the direct holdings of the Court and, in doing so, has threatened the finality and effect of every judgment entered in the Tenth

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[1] *Nevada v. United States* also supplies the authority with which to reject intervenors' assertion that the claimed inadequacy of representation by the United States deprived them of due process. "[T]he Tribe, *through the Government* as their representative, was given adequate notice and a full and fair *opportunity* to be heard." *Ibid.* (italics supplied).

[2] The Court could find no evidence to support the Tribes' argument that the government representation was legally inadequate. 460 U.S. at 627. The Court did suggest that if the government's representation *was* inadequate, the Tribe's remedy, if any, would lie against the government. *Id.* at 627 n.20.

[3] The court of appeals does not even attempt to distinguish the Court's holding in *Heckman.*

Circuit in which it can be simply *alleged* that the United States did not afford adequate representation of restricted Indian interests. It should be emphasized that no finding of inadequate representation has been made in this case. The district court concluded that the representation *had* been adequate (App. F at 30a-31a); the court of appeals held that a *potential* of inadequacy is a basis for permitting post-judgment intervention *and* vacation of the pre-intervention decrees (App. E at 23a-24a).

The government respondents suggest that restricted Indians should not be "uniquely disabled" from relitigating final decrees entered against the government in its capacity as trustee of Indian lands (Federal Resp. Br. at 11). It should be noted that there is nothing "unique" in prohibiting post-judgment intervenors from relitigating prior decrees. It is the normal and long-standing rule that post-judgment intervenors may *not* seek to relitigate prior decrees. *See United States v. California Co-operative Canneries,* 279 U.S. 553 (1929). *See also* Pet. Br. at 14-16. Moreover, this Court in its decision in *Heckman v. United States, supra,* has held expressly that restricted Indians may not relitigate decrees entered against the government in its representation in litigation over trust lands.[4] The reasoning of *Heckman*

[4] *Heckman v. United States,* 224 U.S. at 446 ("And it could not, consistently with any principle, be tolerated that . . . these wards should themselves be permitted to relitigate the question"). *Accord, Arizona v. California, supra,* 460 U.S. at 627; *Nevada v. United States, supra,* 463 U.S. at 144.

is even more compelling in the instant case than in the context of a dispute over title to particular parcels of Indian lands. In the instant case, the litigated issue involved the government's power to adopt and enforce a rule of general applicability concerning the required content of communitization agreements submitted for government approval. It would seem beyond reasonable dispute that the government has authority to litigate and settle disputes concerning its own rulemaking authority in the administration of federal land management statutes.[5]

The government respondents further argue that, since the intervenor respondents moved to intervene within the time for bringing an appeal from the district court's judgment, the intervenors should be permitted to relitigate all

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[5] The government further argues that the proceedings in the district court did not amount to actual litigation. (Federal Resp. Br. at 10). This argument is without merit. The government did not consent to the entry of judgment until after the district court had conducted a hearing and had determined that petitioner was likely to succeed on the merits. Respondents do not suggest that the government and petitioner colluded to deprive the intervenors of any legal rights. A consent decree, as was entered in this case after the district court preliminarily enjoined the government from enforcing the invalid rule, is itself a judicial act possessing the full force and effect of any other final decree. *Siebring v. Hansen,* 346 F.2d 474 (8th Cir. 1965).

The court of appeals and the respondents have repeatedly relied upon the fact that a consent decree was entered as evidence of inadequate representation by the government. This court has held, however, that the fact that an action has been settled is *not* a proper basis for concluding that representation was inadequate. *See Sam Fox Publishing Co. v. United States,* 366 U.S. 683, 689 (1961). *See also United States v. Associated Milk Producers, Inc.,* 534 F.2d 113 (8th Cir. 1976), *cert denied,* 429 U.S. 940 (1977); *United States v. Board of School Commissioners,* 466 F.2d 573 (7th Cir. 1972), *cert. denied,* 410 U.S. 909 (1973); *Washington v. Keller,* 479 F. Supp. 569 (D. Md. 1979).

aspects of the judgment in the district court (Federal Resp. Br. at 8-9). The intervenor respondents may have had the right, upon intervention, to appeal the legal basis for the final judgment entered by the district court.[6] The holdings of *Heckman v. United States, supra,* and *Nevada v. United States, supra,* do not expressly prohibit such appeals. This Court's decisions do, however, expressly preclude intervention by restricted Indians for the purpose of vacating and relitigating decrees entered against the government in its representative capacity. To hold otherwise would require a person aggrieved by a government rule for the management of Indian trust lands to join as defendants the hundreds or thousands of Indians potentially affected by the rule in order to achieve a final resolution of his claim. The government's authority to litigate the validity of rules promulgated for the benefit of restricted Indians would thus be eliminated for all practical purposes. The rule of *Heckman* is not a rule of judicial economy, but a rule recognizing the government's authority and duty to represent the interests of restricted

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[6] Even if the first decision of the court of appeals (App. F) was correct under this analysis, the second decision of the court of appeals (App. A) was erroneous. After the court of appeals reversed the order of the district court denying intervention, the only course the intervenors would have been permitted to take would have been to appeal the legal conclusions reached by the district court in its final decree (App. G). The intervenors expressly waived any right to appeal after intervention, choosing instead to bring a claim against the government for inadequate representation. *See* Transcript of Proceedings in the District Court had on March 28, 1985, at 31-32.

Indians in adversarial proceedings.[7]

CONCLUSION

Petitioner, Sanguine, Ltd., respectfully requests the Court to grant its writ of certiorari and to review the judgment and decision of the United States Court of Appeals for the Tenth Circuit.

Respectfully submitted,

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[7] The government's suggestion that no harm would be suffered by petitioner should the Court decline to review the judgment of the court of appeals is disingenuous. Petitioner seeks to avoid the complete relitigation of a final decree. This Court's ability to grant effective relief to petitioner from the decision of the court of appeals, which permits a relitigation of the final decree, will be effectively destroyed if a complete relitigation is permitted at this stage of the proceedings. Moreover, refusal of the court of appeals to maintain the validity of the consent decree may have the "serious, perhaps irreparable, consequence" of upsetting the finality of the decree. *See Carson v. American Brands, Inc.*, 450 U.S. 79, 87-88 (1981) (holding that an order refusing to enter a consent decree was appealable as of right to the court of appeals).

CERTIFICATE OF SERVICE

I hereby certify that this Petitioner's Reply Brief in Support of Petition for Writ of Certiorari was served upon the parties hereto this 5th day of January, 1987, by depositing three copies in the United States mails, with first-class postage prepaid, addressed as follows:

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